

## UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

SEAN BARNES and CARL DWYER  
individually, and on behalf of all others  
similarly situated,

Plaintiffs,

v.

THE EQUINOX GROUP, INC., and DOES 1  
through 100, inclusive,

Defendants.

No. C 10-03586 LB

**ORDER (1) CONDITIONALLY  
CERTIFYING SETTLEMENT CLASS  
AND APPOINTING CLASS COUNSEL;  
(2) PRELIMINARILY APPROVING  
SETTLEMENT; (3) APPROVING  
NOTICE TO CLASS; AND (4)  
SETTING HEARING FOR FINAL  
APPROVAL AND PLAINTIFFS'  
MOTION FOR FEES AND COSTS AND  
SERVICE AWARD**

## INTRODUCTION

Most of the claims in this class action settled in a related class action in Los Angeles County superior court. That case is *Evans v. Equinox*, Case No. BC44058. The only claim in this case that is not covered in the state case is the claim for expense reimbursement. Plaintiffs filed an unopposed motion for the following: (1) preliminary approval of the settlement agreement reached by the parties; (2) provisional certification of the proposed settlement class; (3) a proposed plan for notice to the class of the litigation and the proposed settlement agreement; and (4) a proposed schedule for final approval of the settlement and entry of a final order and judgment.

In summary form, the settlement agreement is as follows. *See* Desario Declaration Ex. A, ECF No. 155-1 (the “settlement agreement”). The total sum is \$150,000 allocated to the following categories: (1) expense reimbursement to class members based on the number of personal training

1 sessions they conducted; (2) attorney's fees up to one-third of the settlement (if approved by the  
 2 court) and costs; (3) administrative costs of the settlement; and (4) incentive awards to Plaintiffs of  
 3 up to \$5,000 each (for a total of \$10,000) if approved by the court. The settlement agreement will be  
 4 administered by an independent claims administrator called CPT Group. Excess funds not used to  
 5 pay expense reimbursements, administration costs, and attorney's fees will be distributed as a cy  
 6 *pres* award to Bet Tzedek children's advocacy program.

7 The court held a hearing on April 18, 2013, clarified issues about the release, and now issues this  
 8 order granting provisional class certification, approving the settlement plan preliminarily, approving  
 9 the plan for notice to the class, and setting the schedule for the final approval process (including  
 10 attorney's fees and incentive awards).

## 11 ANALYSIS

### 12 I. JURISDICTION

13 The court has jurisdiction under 28 U.S.C. § 1332(c) and (d)(2).

### 14 II. CONDITIONAL CERTIFICATION OF CLASS

15 For settlement purposes only, the parties propose provisional certification of the following class:

16 All persons employed as Personal Trainers in any of Defendant's facilities located in the State of  
 17 California, except those employed at former Sports Club LA locations, specifically, Equinox  
 18 Beverly Hills, Equinox Irvine and Equinox West LA, during the Class Period (defined as June 1,  
 2006 through the date that Preliminary Approval is granted).

19 Settlement Agreement § 1.10.

20 The court reviews the propriety of class certification under Federal Rule of Civil Procedure 26(a)  
 21 and (b). In a settlement context, the court must pay "undiluted, even heightened, attention" to class  
 22 certification requirements because the court will not have the opportunity to adjust the class based  
 23 on information revealed at trial. *See Staton v. Boeing*, 327 F.3d 938, 952-53 (9th Cir. 2003) (quoting  
 24 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Hanlon v. Chrysler Corp.*, 150 F.3d  
 25 1011, 1019 (9th Cir. 1998) (same).

26 The court finds that the proposed settlement class here meets the requirements of Federal Rule of  
 27 Civil Procedure 23(a) and (b).  
 28

**A. Rule 23(a)**

Class certification requires the following: (1) the class must be so numerous that joinder of all members individually is “impracticable;” (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives must be typical of the claims or defenses of the class; and (4) the person representing the class must be able to fairly and adequately protect the interests of all class members. *See* Fed. R. Civ. P. 23(a); *Staton*, 327 F.3d at 953.

Here, the factors support class certification. First, the class members – all identifiable from employee records – are (per counsel) around 2100, which makes joinder impracticable. *See Jordan v. County of L.A.*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, *County of L.A. v. Jordan*, 459 U.S. 810 (1982). Second, the class members’ claims all involve common facts about business expense reimbursement for similar expenses. Similarly, the class members’ legal issues involve the same legal theories about compliance with the California Labor Code. Third, the claims are typical of the claims of other class members: all involve reimbursement of business expenses that allegedly should have been paid under the Labor Code and that were not paid by the employer. *See Hanlon*, 150 F.3d at 1019-20 (claims are typical if they are reasonably coextensive with that of absent class members; they need not be substantially identical). Fourth, the parties agree, and the court finds, that the named plaintiffs are able to fairly and adequately protect the interests of all class members. The factors relevant to a determination of adequacy are as follows: (1) the absence of potential conflict between the named plaintiff and the class members; and (2) counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation. *Id.* at 1020. The court is satisfied that those factors exist here. As discussed already, the named plaintiffs have shared claims and interests with the class. Also, they have qualified and competent counsel. *See Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992).

**B. Rule 23(b)(3)**

In addition to meeting the prerequisites of Rule 23(a), a proposed class must be appropriate for certification under one of the categories in Rule 23(b). *See* Fed. R. Civ. P. 23(b); *Hanlon*, 150 F.3d

1 at 1022. Plaintiffs seek provisional certification, and the court finds that certification is appropriate  
 2 under Rule 23(b)(3). Questions of law and fact common to class members predominate over any  
 3 questions affecting only individual members. *See* Fed. R. Civ. P. 23(b)(3). The case involves  
 4 multiple claims for relatively small sums, and a class action is superior to an alternative method for  
 5 fairly and efficiently adjudicating the claims. *See Amchem Products*, 521 U.S. at 625;  
 6 *Culinary/Bartender Trust Fund*, 244 F.3d at 1163 (class action appropriate because “if plaintiffs  
 7 cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of  
 8 the disparity between their litigation costs and what they hope to recover”). Also, according to the  
 9 parties, no potential class member has expressed an interest in proceeding independently, and no  
 10 apparent obstacles exist that would make managing a class action difficult. *See* Fed. R. Civ. P.  
 11 23(b)(3)(A), (C) and (D).

### 12 **C. Conclusion: Provisional Certification is Appropriate**

13 Pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), the court conditionally certifies the  
 14 class members set forth above solely for the purpose of entering a settlement in this matter.

### 15 **III. APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL**

16 For the reasons set forth in the previous section, the court appoints Sean Barnes and Carl Dwyer  
 17 as the class representatives. The court finds specifically that they have claims that are typical of the  
 18 claims of class members generally and are an adequate representative of the other members of the  
 19 proposed class. The court also provisionally finds that Scott Cole & Associates, APC have  
 20 sufficient experience and expertise in prosecuting class action cases and appoints the firm as class  
 21 counsel for settlement purposes only.

### 22 **IV. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

23 Procedurally, the approval of a class action settlement has two stages: (1) the preliminary  
 24 approval, which authorizes notice to the class; and (2) a final fairness hearing, where the court  
 25 determines whether the parties should be allowed to settle the class action on the agreed-upon terms.  
 26 In reviewing the proposed settlement, the court need not address whether the settlement is ideal or  
 27 the best outcome, but determines only whether the settlement is fair, free of collusion, and consistent  
 28 with Plaintiff’s fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1027. The *Hanlon* court

1 identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case;  
2 (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining  
3 class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of  
4 discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7)  
5 the presence of a government participant; and (8) the reaction of class members to the proposed  
6 settlement. *Id.* at 1026 (citation omitted).

7 The court evaluated the proposed settlement agreement for overall fairness under the *Hanlon*  
8 factors and concludes that preliminary settlement is appropriate. First, the strength and relative  
9 relation of this case to the state case militate in favor of settlement. Second, the related point  
10 litigation poses risks, and this litigation (as the docket sheet reveals) has been expensive and  
11 protracted (and complicated given the interplay with the related state class action). Third, the  
12 amount offered in settlement appears sufficient to cover the expenses at issue in this litigation given  
13 the risks identified. The expenses will be allocated to personal trainers based on the number of  
14 personal training sessions taught during the class period. Settlement Agreement § ¶ 3.4. This seems  
15 reasonable in light of the defenses and appellate risks that experienced counsel have identified. The  
16 monetary value of this portion of the case is relatively low compared to the rest of the case (which  
17 settled in state court for a fund of \$5.5 million). Also, the settlement is the product of serious, non-  
18 collusive, arms' length negotiations by experienced counsel with the assistance of a private  
19 mediator.

20 At this stage, the settlement plan seems sufficiently fair for preliminary approval. The court  
21 advises the parties that a further showing will be needed for final approval on two grounds.

22 First, the settlement agreement provides for attorney's fees of up to one-third of the fund, or  
23 \$50,000. The record that the court has now is not sufficient to determine whether that amount is  
24 appropriate. This is an unusual case, and ordinarily the amount seems fine, but also, the settlement  
25 agreement suggests that counsel may obtain additional attorney's fees from the *Evans* settlement.  
26 That issue should be illuminated at the final approval stage. Moreover, one-third of the fund may in  
27 and of itself be excessive (although again, in the context of this litigation, that may not be the case).  
28 *See Hanlon*, 150 F.3d at 1029 (twenty-five percent is considered a benchmark in common fund

cases); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (twenty-five percent benchmark, though a starting point for analysis, may be inappropriate in some cases; fees must be supported by findings). In any event, the court must approve the fee award, and Plaintiff's attorney will make a full showing to justify attorney's fees and should submit its fee request in accordance with the lodestar method.

Second, a similar issue is that the named Plaintiffs may also receive additional incentive rewards in the *Evans* case. While courts have found incentive payments to be reasonable, *see In re Mego Fin. Corp Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), the court must evaluate the award, *see Staton*, 327 F.3d at 952, and Plaintiffs should present evidence justifying why they should receive this award amount given the interplay with the *Evans* case.

Given the parties' submissions in their pleadings and at the hearing, and considering the amount of the settlement fund, these issues need not be resolved at this stage of preliminary approval. The notice describes the incentive payments and attorneys' fees and the need for court approval.

There is another issue, and that is the scope of the release. The release in paragraph five is limited to the expense reimbursement claim that it is the only claim left in this case. Settlement Agreement § 5.2. The parties confirmed on the record that this is the scope of the release. Under the particular circumstances of this case, the release is sufficient.

In sum, the court finds that viewed as a whole, the proposed settlement is sufficiently "fair, adequate, and reasonable" such that preliminary approval of the settlement is warranted. *See Officers for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The court thus approves the settlement agreement preliminarily.

## **V. APPROVAL OF CLASS NOTICE**

The court approves the proposed notice, which will be mailed to all class members whose identities are known to the parties. Under the settlement plan, within ten days of the preliminary settlement, Equinox will provide the Claims Administrator with the class members' names, last known addresses, social security numbers, and number of training sessions taught by each during the class period of June 1, 2006 to the date of preliminary approval. *See Settlement Agreement* § 6.2.2. Within 30 days of preliminary approval, the Claims Administrator will send class members the class

1 notice, the claim form, and the exclusion form via first-class U.S. mail. *Id.* § 1.17. The claim form  
 2 will state the total number of training sessions, inform class members that they may be able to  
 3 receive additional compensation if they submit valid claims that are in aggregate less than the net  
 4 settlement amount, and explain how they can submit additional documentation of additional training  
 5 sessions if they believe the number of sessions is wrong. *Id.* § 6.3.1. The Claims Administrator will  
 6 send a reminder postcard 15 days before the expiration of the claims period. *Id.* § 7.1. The Claims  
 7 Administrator also will run one skip-trace on any materials returned as undeliverable and remail  
 8 them. *Id.* (The parties have already scrubbed the mail list through the notification process in state  
 9 court, and apparently only 44 notices were returned as undeliverable.)

10 The court also finds that the notice fairly, plainly, accurately, and reasonably informs class  
 11 members of the following: (1) the nature of the litigation, the settlement class, the identity of class  
 12 Counsel, and the essential terms of the settlement agreement, including the plan for the refunds of  
 13 the premiums; (2) information about how administrative costs, court-approved attorney's fees, and  
 14 possible payment to the class representative (if approved by the court) will be paid from the fund;  
 15 (3) how to challenge or opt out of the settlement, if they wish to do so, and the effect of failing to do  
 16 so; (4) this court's procedures for final approval of the settlement and settlement agreement and the  
 17 class members' right to appear if they desire; and (5) how to obtain additional information  
 18 regarding this litigation, the settlement agreement and the approval process.

19 In sum, the form of the notice is approved, and the manner of distributing the class notice is  
 20 approved.

## 21 **VI. COMPLIANCE WITH CLASS ACTION FAIRNESS ACT**

22 The record does not establish that counsel served the required notices under the Class Action  
 23 Fairness Act of 2005, 28 U.S.C. § 1715, with the documentation required by 28 U.S.C. § 1715(b)(1-  
 24 8). Any final settlement approval will be more than 90 days after service. *See* 28 U.S.C. § 1715.

## 25 **VII. PROCEDURES FOR FINAL APPROVAL OF SETTLEMENT**

26 The schedule for dates and deadlines is set forth in the table below and discussed in the sections  
 27 that follow.



<u>Event</u>	<u>Date</u>
Distribution of Court-Approved Class Notice	30 days after issuance of this order
Deadline to Opt Out of Class Or Object to Settlement	75 days after date of this order
Deadline for Motion for Attorney's Fees and Plaintiffs' Awards	35 days before final hearing
Final Settlement Fairness Hearing	

#### **A. Fairness Hearing**

At the hearing, the court will determine whether to grant final certification of the settlement class and final approval of the settlement agreement (including the payment of expenses, payment of attorneys' fees and costs and administrative costs, and payment of incentive awards to the class representatives).

#### **B. Mailing of Notice by No Later Than 30 Days From Today**

The court orders Equinox (through the claims administrator) to mail by first-class postage the notice to all known potential settlement class members by no later than 30 days from today's date and follow the procedures listed above. The parties shall file proof of distribution of notice at or before the final hearing.

#### **C. Requests for Exclusion from the Settlement**

1. Class members may exclude themselves, or opt out, of the class settlement, and that request for exclusion must be made in the manner set forth in the exclusion form in Exhibit G.

2. To be excluded from the settlement, the opt-out request must be sent to the addresses in the notice by First Class Mail and must be postmarked by 75 days from the date of this order (which is within 45 days after the Claims Administrator mails it).

3. All requests for exclusion must be provided to counsel and to the court 21 days before the final fairness hearing.

#### **D. Objections to the Settlement**

1. Any class member who has not opted out of the settlement and who wishes to object to the fairness, reasonableness or adequacy of the settlement must do so in writing. Class members who have timely objected to the settlement in writing may also appear at the fairness hearing.



1        2. Objections shall be mailed to the Claims Administrator at the address provided in the Class  
2 Notice and must be postmarked by 45 days after the claims administrator mails the notice (as  
3 provided in the class action notice at Exhibit G to the settlement agreement). Any objector should  
4 include in the written objection a statement of any intent to appear at the final fairness hearing. This  
5 is the procedure in the notice.

6        3. Objections raised at the fairness hearing will be limited to those previously submitted in  
7 writing. Any member of the class who does not timely serve such a written objection shall not be  
8 permitted to raise such objection, except for good cause shown, and any member of the class who  
9 fails to object in the manner prescribed herein shall be deemed to have waived, and shall be  
10 foreclosed from raising, any such objection.

11        4. Class counsel and Equinox shall file copies of all timely objections with the court 21 days  
12 before the fairness hearing.

13        **E. Deadline for Submitting Motion Seeking Final Approval**

14        Plaintiff shall file a Motion for Final Approval of the Settlement and Settlement Agreement at  
15 least two weeks before the final fairness hearing.

16        **F. Deadline for Petition for Attorneys Fees, Costs, and Expenses**

17        Class counsel shall file with this court their petition for an award of attorneys' fees and  
18 reimbursement of costs and expenses, and for approval of a reasonable service award for the named  
19 plaintiffs and class representatives, no later than 35 days before the final hearing (and earlier would  
20 be better). The motion shall be heard at the time of the fairness hearing.

21        **G. Plaintiff's and Class Members' Release**

22        If, at the fairness hearing, this court grants final approval to the settlement and the settlement  
23 agreement, the named Plaintiff and each individual settlement class member who does not timely opt  
24 out will release claims, as set forth in the settlement agreement, by operation of this court's entry of  
25 the judgment and final approval.

**CONCLUSION**

This disposes of ECF No. 154.

**IT IS SO ORDERED.**

Dated: April 18, 2013



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LAUREL BEELER  
United States Magistrate Judge